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No. 88-672

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

TRIANGLE INDUSTRIES, INC., successor in interest to CENTRAL JERSEY INDUSTRIES, INC.,
Petitioner,

v.

STANLEY ZULKOWSKI, SR., and CLARA RUTH ZULKOWSKI, CONSOLIDATED RAIL CORPORATION, GARLOCK, INC., CERTAIN-TEED CORPORATION, RAYMARK INDUSTRIES, INC., a/k/a Raybestos-Manhattan, Inc., CELOTEX CORPORATION, and ARMSTRONG WORLD INDUSTRIES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS CONSOLIDATED RAIL CORPORATION, STANLEY ZULKOWSKI, SR., AND CLARA RUTH ZULKOWSKI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Was not the court of appeals correct in holding that a former railroad company reorganized pursuant to the now-repealed Bankruptcy Act, as supplemented by the Regional Rail Reorganization Act of 1973, can be found liable to its former railroad employees on claims instituted under the Federal Employers' Liability Act for injuries allegedly traceable to the conditions of their railroad employment even though the injuries did not become manifest until after the company completed its reorganization and ceased its railroad operations?

DESIGNATION OF CORPORATE RELATIONSHIPS

Respondent Consolidated Rail Corporation, the only respondent that is a corporation, is not owned by any parent corporation. It has an ownership interest in the following companies: Akron & Barberton Belt Railroad Company; Albany Port Railroad Company; Belt Railway Company of Chicago; Calumet Western Railway Company; Chicago & Western Indiana Railroad Company; Indiana Harbor Belt Railroad Company; Lakefront Dock & Railroad Terminal Company; Monongahela Railway Company; Nicholas, Fayette & Greenbrier Railroad Company; Peoria & Pekin Union Railway Company; and Trailer Train Company. Consolidated Rail Corporation does not have an ownership interest in any other company, except for its wholly-owned subsidiaries.

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Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS CONSOLIDATED RAIL CORPORATION, STANLEY ZULKOWSKI, SR., AND CLARA RUTH ZULKOWSKI

Respondents Consolidated Rail Corporation ("Conrail"), Stanley Zulkowski, Sr., and Clara Ruth Zulkowski respectfully submit that this Court should deny the petition for a writ of certiorari. The petition seeks review of the opinion issued in this case by the United States Court of Appeals for the Third Circuit. The opinion is reported at 852 F.2d 73 (3d Cir. 1988).

COUNTER-STATEMENT OF THE CASE

Petitioner, referred to in this brief as CJI, is the former Central Railroad Company of New Jersey ("CNJ"), which completed a bankruptcy reorganization

in 1979.[1] That bankruptcy reorganization was conducted pursuant to section 77 of the now repealed Bankruptcy Act of 1898, former 11 U.S.C. § 205, as supplemented by the Regional Rail Reorganization Act of 1973 ("Rail Act"), as amended, 45 U.S.C. §§ 701-97.

CJI is asking this Court to interpret the Rail Act, a statute that Congress enacted in order to resolve the railroad transportation crisis that existed in the early 1970's and which applies only to CJI and a very few other entities. Although CJI disagrees with the interpretation of that statute given by the United States Court of Appeals for the Third Circuit in this case, the Third Circuit's opinion was unanimous and no other court of appeals has disagreed with its holding that the Rail Act did not relieve CJI from liability under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, for its former railroad employees' claims for latent injuries traceable to the conditions of their CNJ employment.

The court of appeals issued its decision in the context of an interlocutory appeal instituted in order to answer a question certified by the Honorable Dickinson R. Debevoise of the United States District Court for the District of New Jersey. Judge Debevoise had denied CJI's motions for summary judgment and partial summary judgment filed in an action brought against CJI, Conrail, and several distributors of asbestos products by respondent Stanley Zulkowski, Sr., a former CNJ employee, and his wife, Clara Ruth Zulkowski. The Zulkowskis sued CJI and Conrail under the FELA because Mr. Zulkowski alleges he recently manifested symptoms of disease as the result of exposure to asbestos during his

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1. As of September 14, 1979, the Consummation Date of its reorganization, CNJ changed its name to Central Jersey Industries, Inc. It later changed its name to CJI Industries, Inc., and has now apparently taken the name of Triangle Industries, Inc.

railroad employment by CNJ from 1962 until 1976 and by Conrail from 1976 until his 1979 retirement.

While Mr. Zulkowski worked for CNJ, CNJ filed a petition for reorganization in bankruptcy in the United States District Court for the District of New Jersey. CNJ's bankruptcy proceeding lasted from 1967 until 1979, and CNJ was not the only railroad in financial distress during that period. Between 1967 and 1973, seven other northeastern and midwestern railroads filed petitions for reorganization. The resulting rail transportation crisis prompted Congress to enact the Rail Act. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 108-109 (1974).[2]

The Rail Act provided for the creation of Conrail and required the conveyance to Conrail of designated rail assets from the various railroads in reorganization pursuant to a Final System Plan devised by the United States Railway Association and approved by Congress. Pursuant to the Rail Act and the Final System Plan, Conrail was incorporated and commenced operations on April 1, 1976, with rail assets that included most of those formerly owned by CNJ and other railroads then involved in reorganization proceedings. Many employees from CNJ and the other railroads in reorganization, including Stanley Zulkowski, accepted the offers of employment Conrail was required to extend and became Conrail employees.

CNJ completed its reorganization on September 14, 1979 (the "Consummation Date"). Effective that date, CNJ amended its certificate of incorporation and changed its name. Describing itself as "the successor through reorganization under § 77 of the federal bankruptcy laws of The Central Railroad of New Jersey," 852

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2. The court of appeals cited this opinion under the caption *Blanchette v. Connecticut Gen. Ins. Corps. See, e.g.*, 852 F.2d at 76 (Pet. App. 7a).

F.2d at 78 (Pet. App. 11a-12a), CJI became vested with all remaining CNJ assets, which included cash, investments, real estate, long term leases, net operating loss carryforwards resulting from CNJ rail operations, and certificates issued by the United States giving CJI the right to payment for the CNJ rail assets that had previously been conveyed to Conrail free and clear of any liens and encumbrances. *Id.* at 77 (citing 45 U.S.C. § 743(b)(2)) (Pet. App. 9a). By 1985, CJI had used its assets to create a business with a net income of $5.8 million and with stock listed on the Philadelphia Stock Exchange. *Id.* at 75 (Pet. App. 4a). In September of 1986, CJI redeemed the certificates it had received for the rail assets conveyed to Conrail and received from the United States $91,786,087 in cash, including principal and interest, as payment for those rail assets. *Id.* at 77 (Pet. App. 9a). Although no longer a railroad, CJI has continued to operate, acquiring manufacturing companies and otherwise engaging in business.

After the Consummation Date, CJI was named as a defendant in a number of FELA actions brought by former CNJ employees seeking recovery for illnesses that were traceable to the conditions of their CNJ employment but which had not been manifest before the Consummation Date. CJI petitioned the Honorable Clarkson S. Fisher, who had issued the Consummation Order in the CNJ reorganization, for a declaration that the claims of former CNJ employees had been discharged. Judge Fisher granted CJI's petition, held that the claims of former CNJ employees were discharged even if the employees' injuries had not been manifest as of the Consummation Date, and enjoined the employees from prosecuting FELA actions against CJI.

Conrail and several former CNJ employees appealed Judge Fisher's order to the United States Court of Appeals for the Third Circuit, where the appeal was consolidated with appeals involving comparable claims and

issues with respect to the Reading Company and former Reading Railroad employees. The United States Court of Appeals for the Third Circuit held that the FELA claims of former CNJ and Reading Railroad employees for injuries caused by the conditions of their Reading and CNJ railroad employment, but not manifest until after the Consummation Dates of the CNJ and Reading reorganizations, were not "claims" within the meaning of section 77 of the Bankruptcy Act and thus had not been dischargeable in CNJ's and Reading's reorganization proceedings. *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985).[3]

The FELA claim for recently manifested asbestos disease that Stanley Zulkowski has asserted against CJI in this case is a claim of the type that the Third Circuit previously held was not dischargeable in the CNJ reorganization proceeding. Nevertheless, CJI moved for summary judgment on that FELA claim and Conrail's contingent cross-claim for indemnification, contending that CJI is not liable for injuries of former CNJ employees that are traceable to the conditions of their CNJ employment but did not become manifest before the Consummation Date of the CNJ bankruptcy reorganization. CJI pointed out that it had retained only CNJ non-rail assets, while Conrail had received substantially all of the CNJ rail assets, and asserted that the Rail Act had established Conrail from its inception as a "reorganized"

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3. After the Third Circuit's decision in *Schweitzer*, when this Court had denied CJI's and the Reading Company's petition for a writ of certiorari, the Reading Company, on remand, asked the Honorable J. William Ditter, Jr., of the United States District Court for the Eastern District of Pennsylvania to rule that it could not be liable on FELA claims of former Reading Railroad employees despite the Third Circuit's ruling that the claims had not been dischargeable. Judge Ditter refused, holding that the Reading Company, as the reorganized Reading Railroad, had liability for non-discharged obligations that arose out of its pre-reorganization conduct. *Schweitzer v. Consolidated Rail Corp.*, 65 Bankr. 794 (E.D. Pa. 1986).

railroad company with liability for injuries arising out of the conditions of CNJ employment before Conrail commenced its operations on April 1, 1976.

Judge Debevoise denied CJI's motions and entered an order certifying the following question for immediate appeal:

> Whether Congress intended in § 77 of the Bankruptcy Act and the Regional Rail Reorganization Act (Rail Act), as amended, or other law, that Consolidated Rail Corporation or the transferors reorganized under the Rail Act, or both, would succeed to the responsibility for FELA claims that were unmatured at the time of the conveyances; and whether the nature of the reorganization of The Central Railroad Company of New Jersey precludes any liability on behalf of CJI Industries, Inc. on such claims.

(Pet. App. 31a). The United States Court of Appeals for the Third Circuit granted CJI permission to appeal under 28 U.S.C. §1292(b), but the court of appeals narrowed the question to resolve only the issue that was actually before the district court—whether any liability could be imposed on CJI for plaintiffs' claims. 852 F.2d at 75 (Pet. App. 6a-7a).

On July 19, 1988, the court of appeals affirmed Judge Debevoise's denial of CJI's motions for summary judgment in a unanimous opinion. In so doing, it considered and rejected all arguments raised by CJI, including the argument that the Rail Act relieved it of liability for its former employees' FELA claims and the contention that the FELA cannot apply to a company that has ceased its railroad operations. CJI did not argue in the court of appeals, as it has in its petition for a writ of certiorari, that this Court's opinion in the *Regional Rail Reorganization Act Cases* endorses CJI's view that the Rail Act created Conrail as a reorganized company sad-

dled with liability for any non-discharged FELA claims that would later be instituted by former employees of the railroads from which Conrail received rail assets.

On August 11, 1988, the Third Circuit denied CJI's petition for rehearing. (Pet. App. 18a-19a). Respondents received CJI's petition for a writ of certiorari on October 18, 1988.

REASONS FOR DENYING THE PETITION

1. Examination of the Guidelines Set Forth in This Court's Rule 17 Makes It Clear that There Are No Special and Important Reasons for Granting the Petition To Review the Third Circuit's Decision.

The United States Court of Appeals for the Third Circuit decided only a narrow question in this case concerning whether CJI—as a former railroad reorganized under a bankruptcy statute that has now been repealed, as supplemented by a statute that applies only to those few railroads reorganized in the early 1970's—can be held liable under the FELA to its former railroad employees. The Third Circuit's decision that CJI can be held liable under the FELA to its former railroad employees does not have far-reaching consequences, is not in conflict with the decision of any other court of appeals or with any decision of this Court, does not involve an important question of federal law that needs to be settled by this Court, and is manifestly correct.

CJI recognizes in its petition that it is a reorganized company that would, under usual corporate and bankruptcy law principles, have retained ongoing liability for claims that were not discharged in its bankruptcy proceeding. *See* Pet. 10. However, CJI seeks to avoid liability on Stanley Zulkowski's non-discharged FELA claim (1) by now contending for the first time that this Court in the *Regional Rail Reorganization Act Cases* interpreted the Rail Act so that it somehow makes Conrail, not CJI,

responsible for CJI's pre-reorganization conduct of its railroad business and (2) by repeating the argument it made in the court of appeals that only an operating railroad, not a former railroad, can be held liable under the FELA.

CJI has contorted this Court's opinion in the *Regional Rail Reorganization Act Cases* in an attempt to make it conflict with the Third Circuit's opinion so that its petition might be thought to come within the guidelines set forth in this Court's Rule 17, which lists considerations governing review on certiorari. That attempt should be rebuffed.

First, the petition should be denied because CJI never contended in the court of appeals that the district court's refusal to hold that the Rail Act relieved CJI of railroad-related liabilities was in conflict with this Court's 1974 opinion upholding the Rail Act's constitutionality. Therefore, CJI is barred from making that argument for the first time in this Court. *See Miller v. Avirom*, 384 F.2d 319, 321-23 (D.C. Cir. 1967) (citing *Hormel v. Helvering*, 312 U.S. 552, 556-58 (1941)).

Second, the petition should be denied because CJI is clearly wrong when it asserts that the court of appeals decision conflicts with this Court's Rail Act decision. CJI's only support for that assertion is this Court's frequent use of the word "reorganization" coupled with one reference to Conrail as "the reorganized company" in a context completely unrelated to the question of liability for claims arising out of other former railroads' activities. CJI's belief that this Court's Rail Act opinion must be read as containing an "implication that Conrail, as the reorganized company, was liable unless the Rail Act withdrew that liability" (Pet. 13) is unsupported and wrong. A fancied "implication" does not a conflict make.

CJI also attempts to come within the guidelines of this Court's Rule 17 by inflating the Third Circuit's footnote holding that a former railroad can have FELA lia-

bility into an important question of federal law that should be settled by this Court. That attempt must also be rebuffed. The Third Circuit's holding does not conflict with that of any other court and is entirely consistent with this Court's earlier expansive interpretations of the FELA. *See, e.g., Urie v. Thompson*, 337 U.S. 163 (1947).

2. The Third Circuit's Decision that the Rail Act Did Not Relieve a Reorganized Former Railroad from Liability for Its Former Employees' FELA Claims Does Not Conflict with this Court's Opinion Upholding the Rail Act's Constitutionality.

CJI seeks to avoid statutory responsibility under the FELA by claiming that this Court's treatment of the Rail Act as a reorganization statute in the *Regional Rail Reorganization Act Cases* somehow leads to the implicit conclusion that the Rail Act relieved CJI of the FELA liability it would otherwise have had to satisfy nondischarged claims traceable to its pre-reorganization railroad activities. As noted above, CJI never mentioned in the court of appeals the "conflict" it now asserts exists between the district court ruling affirmed by the court of appeals and this Court's Rail Act opinion. However, even if substantive consideration of CJI's new assertion were proper, it is clear that there is no conflict, direct or implied, between the court of appeals decision and this Court's Rail Act opinion.

According to CJI, its immunity from FELA liability flows from the frequent use of the word "reorganization" in the Rail Act and this Court's statement in the *Regional Rail Reorganization Act Cases* that Congress enacted the Rail Act pursuant to its bankruptcy power. From these two points, CJI leaps to the assertion that the Rail Act must necessarily by implication relieve CJI of liability to its former employees because the Act fails to state explicitly that it is *not* relieving CJI of such liability. The illogic of this proposition is obvious. CJI carefully

overlooks (1) that it would have responsibility for the non-discharged obligations arising out of its earlier railroad activities under standard corporate and bankruptcy law principles and (2) the principle that Congress cannot be presumed to have abrogated that responsibility without any clear expression of such intent.

CJI's position in its petition is also wholly inconsistent with what the Rail Act intended and accomplished. If Congress had intended to establish Conrail as the reorganized rail company and CJI as the reorganized non-rail company, the structure of the Act would have been quite different. First, the Act necessarily would have divided all of the assets and liabilities of the various reorganizing railroads into rail and non-rail categories. Conrail would have received both the rail assets and the liabilities that arose out of the operation of those assets. Likewise, CJI would have received the non-rail assets and the corresponding non-rail liabilities. CJI would not have retained the liabilities arising out of its railroad operations, but it would also not have received payment for the CNJ rail assets or retained the benefit of the net operating loss carryforwards that arose out of CNJ's unprofitable railroad operations. Those carryforwards would have gone to Conrail, not CJI, if Conrail were the railroad successor of CNJ.

But none of this occurred because the Rail Act did not repeal a basic tenet of bankruptcy reorganization—that the corporate existence of the debtor, with all its attendant benefits and burdens, devolves upon the reorganized company that emerges as of the consummation date of the reorganization. The Rail Act operated as a "reorganization statute" because it made it possible for CNJ and the other corporations that had been operating railroads to reorganize and continue in business without continuing to operate railroads. The Rail Act did not, as CJI implies, turn the newly formed Conrail into a reorganized company.

The Rail Act was enacted in order to "supplement" section 77 of the Bankruptcy Act. H.R. REP. No. 7, 94th Cong., 1st Sess. 4-5 (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News 35, 36. If CJI's contention were correct, the Rail Act would have repealed, not supplemented, section 77.

CJI's scenario of two reorganized companies is undermined, not supported as CJI says, by section 601(b)(4) of the Rail Act, 45 U.S.C. § 791(b)(4). Section 601(b)(4) authorized the CNJ reorganization court, following the conveyance of CNJ's railroad properties to Conrail

> to reorganize or liquidate such railroad in reorganization pursuant to Section 77 on such terms as the court deems just and reasonable, or pursuant to any other provisions of the Bankruptcy Act, if the court finds that such action would be in the best interests of such estate.

CNJ's reorganization court elected to reorganize CNJ pursuant to section 77. Under section 77, as under all bankruptcy reorganization statutes, the company emerging from the section 77 reorganization proceeding remains responsible for all liabilities of the debtor that were not discharged in that proceeding. CJI, and CJI alone, has liability for claims of its former employees for illnesses that were job-related but not manifest before the Consummation Date.

CJI's receipt of the benefit of net operating loss carryforwards is also compelling evidence that it is to be treated as the only reorganized CNJ with retained liability for nondischarged claims arising from its railroad operations. Under section 374(e) of the Internal Revenue Code, these net operating loss carryforwards do not expire but may be used to offset income resulting from the redemption of certificates of value received for CNJ's transferred rail assets. But section 374(e) makes the use

of these net operating loss carryforwards available only to the corporation that incurred the losses from railroad operations. Thus, CJI's receipt of the benefit of these net operating loss carryforwards for federal income tax purposes is necessarily dependent upon CJI being the same corporation—albeit in reorganized form—that operated the railroad in the name of CNJ.

It has long been the practice in bankruptcy reorganizations to transfer the debtor's property "free and clear of third-party interests and to channel these interests to the proceeds thereby created." *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir.), *cert. denied*, ____ U.S. ____, 57 U.S.L.W. 3235 (U.S. Oct. 4, 1988) (No. 87-2082). *See also In re Penn Central Transportation Co.*, 383 F. Supp. 1128, 1130 (E.D. Pa. 1974) (power of a reorganization court to transfer interests in debtor's property to the proceeds of a sale is well established). For example, if a company involved in a reorganization proceeding sells real estate on which a third party has a lien, the purchaser will receive the real estate free and clear while the holder of a lien must seek to recover from the proceeds of the sale received by the reorganizing company. *Van Huffel v. Harkelrode*, 284 U.S. 225 (1931). Thus, even if CJI had some basis for its farfetched supposition that future claims of CNJ employees for occupational diseases might somehow have been "attached" to the CNJ rail assets, principles of either corporate or bankruptcy law would require transferring the claims from the rail assets CNJ conveyed to Conrail to the proceeds CJI received for the rail assets.

Again twisting the law and the facts, CJI makes a final, convoluted argument aimed at convincing this Court that the lower court "mistakenly believed" that the Rail Act's statutory value scheme would be perverted if CJI were released from liability for future claims arising out of rail operations. Pet. 14. CJI argues that the "value of other benefits" it received in addition to cash under

the Rail Act should be "assumed" to have included the value of future claims arising out of rail operations. However, CJI concedes, as it must, that neither the Special Court nor the United States Railway Association nor the Rail Act nor any other statute contains any explicit statement in support of CJI's assertion. *See* Pet. 15. Indeed, not one of the Special Court cases cited by CJI for the proposition that the value of other benefits includes the value of future claims arising out of rail operations says anything of the kind.

CJI is really asking this Court to grant its petition in order to decide whether Conrail could be held liable for injuries sustained by Mr. Zulkowski while he was employed by CNJ. But deciding that issue would require this Court to reach beyond the issues decided by the court of appeals and to render an advisory opinion as to Conrail's so-called successor-liability for latent tort injuries of former CNJ employees. Conrail has not sought summary judgment and will not pursue its contingent cross-claim for indemnification from CJI unless and until there would be a judgment that held Conrail liable for injuries caused by Mr. Zulkowski's CNJ employment.

The issue of Conrail's responsibility, if any, for FELA claims of other railroads' employees is theoretical and wholly outside the record of this case. CJI seeks a ruling that would apply not only to itself but to all railroads that were reorganized and transferred rail assets to Conrail, even though CJI is the only transferor that is a party here and even though the record contains no information regarding the reorganization proceedings or corporate structures of the other railroad companies involved. The record contains no information as to the current ownership of the various rail assets transferred to Conrail in 1976 to which CJI contends the FELA claims were attached. The record also contains no information as to what portion of his injury Mr. Zulkowski alleges was caused by the conditions of his fourteen years of

CNJ employment as opposed to his three years of Conrail employment.

Furthermore, the issue of whether Conrail received pursuant to the Rail Act any liability for the negligent conduct of a transferor railroad, such as CNJ, is an issue that lies within the exclusive jurisdiction of the General Panel of the Special Court established by the Rail Act. *See* 45 U.S.C. § 719(e). If CJI wants to raise the issue, it must do so first in that court.[4]

3. The Third Circuit's Holding That a Former Railroad Can Be Found Liable to Its Former Railroad Employees under the FELA for Latent Injuries Traceable to the Conditions of Their Railroad Employment Is Correct and Fully Consistent with Existing Federal Precedent.

CJI attempts to fashion "an important federal question," and thereby secure review in this Court, by mischaracterizing the holding of the court of appeals. The

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4. CJI's argument that the Special Court's opinion in *Consolidated Rail Corp. v. Reading Co.*, 654 F. Supp. 1318 (Regional Rail Reorg. Ct. 1987), somehow contradicts the Third Circuit's opinion seriously misstates the Special Court's holding. The Special Court did *not* hold that the Rail Act provides any basis for the imposition of successor liability on Conrail. Indeed, the panel issuing the opinion is a panel of limited jurisdiction. It did not have jurisdiction to interpret the Rail Act as a whole or any portions of the Rail Act other than those added by the Northeast Rail Service Act of 1981. *See* 45 U.S.C. § 1105(a). *See also Consolidated Rail Corp. v. Reading Co.*, 654 F. Supp. at 1324-25. Dicta in the opinion merely notes that whether common law theories of successor liability had been preempted by the Rail Act was not for that panel of the Special Court to decide:

> We do not question that the Rail Act and subsequent legislation did create a comprehensive federal scheme designed to revitalize freight railroads in the region.
>
> Whether that scheme evidences an attempt to preclude imposition of successor liability on Conrail is not for this Court to determine.

Id. at 1330.

court of appeals did not hold, as CJI says, that FELA liability may be imposed "upon a company which was not a railroad at the time the FELA injury occurred." Pet. 15. What the court of appeals held in a footnote is that a defendant may be subject to FELA liability "if *at the time of the exposure leading to the injury* the defendant was a railroad engaging in commerce and the plaintiff was its employee." 852 F.2d at 77-78 n. 7 (Pet. App. 11a).

The Third Circuit's holding is correct. To obscure this, however, CJI distorts the holding and then offers reasons why the holding, as distorted, is erroneous.

First, CJI characterizes the Third Circuit's statement that the FELA applies to an entity that operated as a railroad "at the time of the exposure leading to the injury" as an erroneous and "sweeping statutory construction." Pet. 16. CJI feigns horror at this conclusion, apparently because CJI was not a railroad when Mr. Zulkowski alleges he first manifested symptoms of asbestos-related disease. Pet. 17. However, the FELA has not been construed to require either that the defendant be a currently operating railroad or that the plaintiff be a railroad employee at the time the plaintiff's cause of action accrues. Rather, the relevant time for purposes of determining the appropriate defendant in an FELA action is the time the negligence causing the injury occurred. At that time, the defendant must have been a common carrier by railroad engaging in commerce and the plaintiff must have been a railroad employee. So long as those requirements are satisfied, the FELA applies, whether suit is brought after the plaintiff ceases to be an employee or after the defendant ceases to be a railroad.

Any contrary interpretation of the FELA would conflict with this Court's decision in *Urie v. Thompson*, 337 U.S. 163 (1949). In *Urie*, the Court decided that the FELA is not confined exclusively to accidental injuries but also applies to injuries in the nature of occupational diseases. The Court explained:

> To read into this all-inclusive wording a restriction as to the kinds of employees covered, the degree of negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court.

Id. at 181-82. The Court specifically addressed the issue of the latency period between cause and injury in occupational disease cases:

> We do not think the mere difference in the time required for different acts of negligence to take effect and disclose their harmful, disabling consequences would justify excluding the one type of injury from the Act's coverage or that such an exclusion would be consistent with its language, purposes, or unvarying standards of construction.

Id. at 187. If CJI were correct that an FELA cause of action for occupational disease must accrue while the railroad is still operating as a railroad, the Court's reasoning in *Urie* would be seriously undermined.

On remand after the Third Circuit's decision in *Schweitzer v. Consolidated Rail Corp.*, the Reading Company took the same position here argued by CJI. The Honorable J. William Ditter, Jr., of the United States District Court for the Eastern District of Pennsylvania rejected the argument and explained his reasons as follows:

> Given the Supreme Court's expression of the purpose of the F.E.L.A. and the fact that that Act covers creeping occupational diseases as well as accidents, it would be unwise and artificial to require as a prerequisite to liability that the injury become manifested before either the employee left the railroad or the employer ceased rail operations.
>
> To satisfy the statute's temporal concern that an

> injury take place "while" the employee is employed by an interstate rail carrier, therefore, plaintiff need not show that a manifest injury occurred, but only that a harmful contact took place during that time.

Schweitzer v. Consolidated Rail Corp., 65 Bankr. at 806-07. For these same reasons, the court of appeals, by means of a footnote, properly rejected CJI's contention that it became immune to FELA liability when it ceased rail operations. 852 F.2d at 77-78, n.7 (Pet. App. 11a n.7).

CJI also contends that it was error under the FELA for the court of appeals to find that it, rather than Conrail, should have responsibility for CNJ rail operations, regardless of the provisions of the Rail Act. Pet. 15. To agree with CJI, the Court would have to depart broadly from well-established common law principles and, importantly, CJI cites no authority to suggest that such a deviation is appropriate in this case. Where the FELA deviates from the common law, that deviation is expressly stated in the language of the statute. For example, in enacting the FELA in 1908, Congress intended to abrogate the common law rule that a plaintiff's contributory negligence would bar recovery in a tort action. It therefore stated that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery." 45 U.S.C. § 53. But there is no language anywhere in the FELA or its legislative history that requires the abrogation of the common law principle that the proper defendant is the entity whose negligence caused the plaintiff's injury.

Finally, CJI contends that the Third Circuit's finding that CJI can be subject to FELA liability "is directly contrary to its analysis in *Schweitzer*." Pet. 18. However, the Third Circuit's view of the FELA in this case is entirely consistent with both its analysis and its holding in *Schweitzer*, which is obviously why CJI makes its

subsidiary argument that *Schweitzer* should be overruled.

Schweitzer held only that FELA claims based on latent diseases that do not manifest themselves until after the railroad employer has been reorganized are not dischargeable, since manifestation is a requirement of the plaintiff's cause of action in tort. As explained by the court of appeals, its decision in *Schweitzer* left open the question of what entity was to be held responsible for the nondischarged claims. Based on the law and the facts of this case, the court of appeals has now reached the logical and correct conclusion: CJI, the entity whose rail operations allegedly caused injury to its railroad employee, should bear this burden.

The court of appeals unanimously and correctly found in a brief paragraph that a former railroad can be subject to FELA liability on a former employee's claim for latent injuries arising out of the conditions of his previous railroad employment. There is no important question of federal law in this case that needs to be settled by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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